IN THE

Supreme Court of the United States

Receivers of
VIRGINIA IRON, COAL & COKE COMPANY
and others . . . . . Petitioners
vs.
WILLIAM H. STAAKE, Trustee for
C. R. BAIRD & CO., Bankrupts, . Respondent

BRIEF OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS.

In the Court below the facts were agreed upon and we adopt the statement of them made by the Circuit Court of Appeals in its opinion. (See record page 28). They are as follows:

Chester R. Baird, trading as C. R. Baird and Company, on December 7th, 1899, owned certain real estate in the State of Virginia known as the West End Furnace property and as of said date, he sold it to the Roanoke Furnace Company subject to certain existing encumbrances and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under

the contract, to-wit: shares amounting to $500,000 of the capital stock of the said Furnace Company. [This contract was not recorded in accordance with the Virginia Statute.]

After the contract of sale, the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the Company was executed by Baird until November 5th, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments amounting to over $40,000 (some of which were sued out by your petitioners) against Baird as a non-resident of Virginia, were issued at the instance of certain creditors and were levied upon the Furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon. (Code of Virginia, Sections 2463, 2464, 2465, and 2472). Within four months from the levying of the attachments, to-wit: On December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania and he was adjudged a bankrupt, and on January 2d, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29th, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt.

On March 26th, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June

29th, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

Under orders of Court, the property conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom and all these claims were submitted to the determination of the Court below by express consent of all the parties.

Upon the issues made by petitions and answers, the Court below ruled that the attachments against Baird, having been obtained through legal proceedings against him when he was insolvent and within four months prior to the filing of the petition in bankruptcy against him, were null and void under Section 67f of the Bankrupt Act of 1898, so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the benefit of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors and authorized and empowered to enforce said attachments and liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings interfered.

This decree of the District Court was affirmed on November 15th, 1904, in an opinion delivered by Morris, District Judge, concurred in by Goff, Circuit Judge—District Judge Purwell dissenting; and the case is before this Court on a writ of *certiorari*.

ARGUMENT.

Under the Registry Laws of the State of Virginia, a contract for the sale of real estate is good against subsequent purchasers for valuable consideration, without notice and creditors, provided it be admitted to record, but as to such persons it is void, if not recorded.

For the convenience of the Court, we here copy the provisions of the Code bearing on this subject:

"Sec. 2463: CONTRACTS IN CONSIDERATION OF MARRIAGE, OR FOR THE SALE OF REAL ESTATE, &c., VOID AS TO CREDITORS AND PURCHASERS, UNLESS IN WRITING—Every contract not in writing, made in respect to real estate or goods and chattels in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall be void, both at law or in equity, as to purchasers for valuable consideration without notice and creditors.

Sec. 2464. IF IN WRITING AND RECORDED, AS VALID DEEDS—Any such contract if in writing, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

Sec. 2465. CONTRACTS, DEEDS, &c., THAT ARE VOID AS TO CREDITORS AND PURCHASERS, UNLESS RECORDED—Every such contract in writing, every deed conveying any such estate or term, and every deed of gift, or deed of trust or mortgage conveying real estate or goods and chattels, shall be void as to subsequent purchasers for valuable consideration without notice and creditors, until and except from the time that it is duly admitted to record, in the county or corporation wherein the property embraced in such contract or deed may be."

Another Section of the Code defines what the words "Creditors" and "Purchasers" mean in the preceding Sections and is as follows:

Sec. 2472. WORDS "CREDITORS AND PURCHASERS," HOW CONSTRUED, LIEN OF SUBSEQUENT PURCHASER FOR PURCHASE MONEY

PAID BEFORE NOTICE—The words "creditors" and "purchasers" where used in any previous Section of this chapter shall not be restricted to the protection of creditors of and purchasers from the grantor, but shall extend to and embrace all creditors and purchasers who, *but for the deed or writing, would have had title to the property conveyed, or a right to subject it to their debts.* And as against any person claiming under a deed or other writing, which shall have not been admitted to record before payment by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he comes to a complete purchaser, shall, in equity, have a lien on the property purchased by him for so much of his purchase money as he may have paid before notice."

C. R. Baird was a non-resident of the State of Virginia and under Section 2959 of the Code of Virginia, the State Courts had jurisdiction to issue attachments against him and by virtue of the Registry Laws above mentioned the attachments which were issued on behalf of petitioner and other attaching creditors became liens upon the property which Baird had sold to the Roanoke Furnace Company on account of the failure of the Roanoke Furnace Company to record the contract of sale made about a year previous. It will be observed that Baird had parted absolutely, with all beneficial ownership in the property when he executed this contract. The Furnace Company had taken immediate possession and nothing remained to be done to perfect the absolute legal title in the Furnace Company, except delivery of the deed, which, as we have already stated, was executed and delivered November 5th, 1900, and promptly recorded, more than a month prior to the institution of the proceedings in bankruptcy. It is, therefore, perfectly obvious and there can be no dispute about it, that the attachments

sued out constituted liens on the property of the *Roanoke Furnace Company,* and not upon the property of *C. R. Baird,* at the time the proceedings in bankruptcy were instituted and the sole question for this Court to decide is, whether the bankrupt law of 1898 is intended, not only to avoid attachments and other levies which constitute liens on the bankrupt's property, but also to avoid similar attachments and other liens on property belonging to third parties, which are affected by such liens on account of the Registry Laws of the State of Virginia. It is true that these attachments were sued out against C. R. Baird and were based upon debts of C. R. Baird, but they constituted liens only on the property of the Furnace Company and not upon any property of Baird.

It is conceded that these attachments are valid attachments as against the property of the Roanoke Furnace Company. If there were no bankrupt proceedings and for any reason these attachments could be invalidated, then, unquestionably, this would result solely to the benefit of the creditors of the said Furnace Company. If no attachments had been issued at all, there can be no question that the trustee in bankruptcy of the Furnace Company would have been entitled to this property absolutely free from any claim to it on the part of the trustee in bankruptcy of Baird.

But the Courts below have held in this case that Section 67f was intended to endow the bankrupt courts of the United States with the power and jurisdiction of reaching out and gathering in, not only all of the estate of the bankrupt, but also, all of the property of third parties that may be affected by liens on account of the debts of the bankrupt, provided they come in other respects within the purview of that Section.

Section 67f provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is

insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this Section into effect, provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

A careful reading of the above language, if taken in connection with all the other provisions of the Bankrupt Act of 1898, we respectfully submit, leads to the conclusion that while the above Section uses the language "against a person who is insolvent" that the real meaning and intention of the Section was that all attachments or other liens obtained against the *property* "of a person who is insolvent" at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void.

It must be remembered that an attachment proceeding is a proceeding *in rem*. Its object is not to get a personal judgment against the debtor, but to sequestrate his property and make it liable for his debts.

It may be true that the filing of a petition in bankruptcy is in effect an attachment levied in behalf of *all* the bankrupt's

creditors. But the difference between bankrupt proceedings and an attachment under our State Laws is that an attachment levied on behalf of a creditor under the State Law may constitute a lien not only on the property of the debtor, but upon the property of others besides the debtor; and the lien created by it is simply for the benefit of the attaching creditor and no other creditor; whereas, the filing of a petition in bankruptcy is intended to affect only the bankrupt's property and the proceeding is not for the benefit of the creditor who institutes it solely but for the benefit of all the creditors. In Frazier's case, 9 Amer. Bankr. Rep. 21, 171 Fed. 746, it is said

"The moment the petition is filed the proceedings is in rem. It, in legal effect, sequestrates all of his [the bankrupt's] property interests for the benefit of all his creditors pari passu as if siezed under attachment or the writ of execution. His whole estate passes into custodia legis. Eo instante, every creditor of the bankrupt becomes an adverse party in a legal proceeding for the appropriation of the property of the bankrupt. He stands as a creditor seeking the aid of a Court of exclusive jurisdiction."

We think it clear that the purpose and aim of the bankrupt laws of the United States, whether constitutional or statutory, are to deal with,

(1) The Insolvent debtor,
(2) His estate,
(3) His creditors,

and that with the estates or debts of others than the bankrupt, it was not intended to have anything to do.

The 16th Section of the bankrupt law of 1898, provides "that the liability of a person who is a co-debtor with or guarantor, or in any manner a surety for the bankrupt shall not be altered by the discharge of such bankrupt." This Section indicates that it is the property of the bankrupt

alone which is intended to be affected by the bankrupt proceedings.

The Bankrupt Act does not undertake to interfere with the bona fide alienations by the bankrupt of his property before the institution of bankrupt proceedings against him. It is only where such alienation is in fraud of his creditors that the bankrupt law seeks to interfere. Apart from this qualification, the law takes the property of the bankrupt as it stands at the date of the institution of the proceeding and places it in the hands of a trustee to be equally distributed amongst all of his creditors. As to this property, it has been held time and again both under the present law and under the law of 1867, that the trustee in bankruptcy takes no greater interest in the property than the bankrupt himself.

See Mattocks v. Baker 2 Fed. 455.
Yateman v. Savings Institution 95 U. S. 764.
Stewart v. Platt 101 U. S. 731.
Re New York Economical Printing Co. 110 Fed. 514.
Hewit v. Berlin Machine Works 194 U. S. 296.
(L. E. 986.)

It is submitted, therefore, that Section 67f can not be construed to go as far as was held by the Circuit Court of Appeals in this case, without giving the present bankrupt law a very much wider range than has ever been given it before, and one that does violence to all of our pre-conceived notions of the object of a bankrupt law. While this Section does not in terms, refer to preferences yet the avoidance of preference amongst the creditors of a bankrupt, is the corner stone of the whole structure of the bankrupt law and it is impossible to believe that in this particular Section, this idea was intended to be left out. Independent of the bankrupt law, it has been held in Virginia that a debtor can make an assignment preferring certain creditors and it will be good against creditors whose claims are postponed, and this is true in a large number of States—and the main object of

the provision of the constitution of the United States (Article 1, Section 8) that "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States," was to enable Congress to put it out of the power of an insolvent debtor to do injustice to his creditors by making fraudulent preferences.

See McKenney v. Cheney 11 Am. Bk. R. 54, 58.
Swartz v. Fourth National Bank 117 Fed. Rep. 3.

But when we speak of preferences the pertinent question arises, preference as to what? Obviously, it can only be a preference by one creditor of the bankrupt over others as to the *property of the bankrupt*. Under the provisions of the present law, the rights of creditors who have other security than that of the property of the bankrupt, are clearly recognized and provided for. It can not be believed that the mere fact that the attachments in this instance were against Baird, who was, at that time, insolvent, and that they were issued within four months prior to the filing of the petition in bankruptcy against him, is sufficient to bring the case within the operation of Section 67f. With all due respect, it seems to us that the conclusion at which the District and Circuit Court of Appeals arrived, was due to a too literal adherence to the exact language of this Section, and enough weight was not given to the potent fact that the Court was dealing with the property of a third party and not with that of the bankrupt.

The attention of the court is called to the fact that Section 67f after providing that the attachments and other liens therein mentioned, shall be decreed null and void in case the party is adjudged a bankrupt, declares that the property covered by the lien shall be decreed "wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." This language clearly

shows that the property to which the Section refers is property which, but for the lien, would pass to the trustee of the bankrupt. See

Powers Dry Goods Company v. Nelson 10 N. D. 580.
Frazee v. Nelson 61 N. E. 40.
McKenny v. Cheny 11 Amer. Bankr. Rept. 54.

As we have seen, all title, interest and equity in this property had passed out of Baird prior to the institution of the proceedings in bankruptcy and had vested by a valid deed in the Roanoke Furnace Company, and, therefore, if the attachments levied be destroyed, the property could not possibly pass to the trustee of Baird.

The trustee in bankruptcy of Baird could stand in no higher position than a general assignee to whom a deed had been made by Baird conveying the property for the benefit of all of his creditors. If such a general assignment had been made it is obvious that the property, the title of which had passed to the Furnace Company, could not have been conveyed to the general assignee.

See in re Grissler 136 Fed. 754.

Another error into which the lower Court fell, we submit with all due respect, was a failure to recognize clearly the fact that the Registry Laws set out in the Sections of the Code of Virginia, above quoted, were not intended to protect *general* creditors but *only lien creditors.* As has already been stated, under our attachment proceedings in the State Court, the parties obtaining attachments were the only parties who could be benefited thereby. The general creditors of Baird had no earthly interest in such proceedings. There was no possible way in which they could come in and claim the benefit of the attachments. If no bankrupt proceedings had interfered, there can be no question that the only creditors who could have enforced their claims against

the property levied on, would have been those who had obtained liens by suing out the attachments. Section 2472 clearly shows the kind of creditor that was intended to be protected by the Registry Laws, expressly providing that such laws were intended to embrace "all creditors * * * who but for the deed written would have * * * a right to subject it to their debts * * * *"

The Supreme Court of Virginia, in the case of McCandlish v. Keen, 13 Grat. 615, has practically construed the Registry Laws to be confined to the protection of lien creditors. To the same effect is the case of Dulaney v. Willis 95 Va. 609.

In West Virginia, the statutes of recordation are practically the same as those in Virginia and there it has been held that they apply only to *lien* creditors.

See Houston v. McCluney 8 West Va. 153.

To hold that a failure to record a deed would avoid it as to general creditors would result in such obvious inconvenience to the public that no law of that kind would be permitted to remain upon the statute books of any State for any length of time. Such a law would obviously so interfere with the transfer of real property that it would almost put a stop to it. A party examining the title to real estate under such law would not only have to look at the records in the Registry Office but would have to make inquiries as to all of the debts of the owner of the property before he would dare to pass upon the title. The effect of the Registry Laws must not be confounded with the case of a fraudulent conveyance in which case by an express provision of our statutes (Code, Section 2460) general creditors are allowed to come in and participate with the lien creditors in the property of the debtor fraudulently conveyed. Here no question of fraud arises. It is agreed that the deed from Baird to the Furnace Company was valid. The attachments sued out were

based upon the non-residence of the debtor solely and did not seek to reach property conveyed away in fraud of creditors. These attachments reached the property of the Furnace Company, not because it was a fraud for the Furnace Company to hold this property, but simply because the Furnace Company had failed to record the contract, which was the evidence of its title.

A further discussion of this matter would, in our opinion, serve no good purpose, as it seems to us our argument is practically contained in the statement of facts, and we can not see that any new light would be thrown upon the subject by an attempt to present the facts from other standpoints than those already pointed out.

It is, therefore, respectfully submitted that the decree of the Circuit Court of Appeals should be reversed, and that it should be held that your petitioners along with the other attaching creditors are entitled to the lien of their attachments for the full amounts which they may prove are due them.

Respectfully Submitted,
WM. GORDON ROBERTSON,
EDWARD W. ROBERTSON,
of Counsel for Petitioners.

Holmes Conrad,
Of Counsel.